Supreme Court, U.S.
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No. 03-1301

In The

Supreme Court of the United States

October Term, 2003

GREGORY BURRIS,
Petitioner,

vs.

JERRY HILL,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(Restated)

Petitioner's introduction to his "Questions Presented" is not consistent with the facts found by the district court. That court found that the coupling of Florida's obscenity law with Florida's RICO Act did not unconstitutionally prevent the sale of non-obscene sexually explicit materials. The court also found that Petitioner failed to demonstrate any evidence of self-censorship of the sale or distribution of legally protected sexually explicit materials. Therefore, the Questions Presented should be reworded as follows:

I. Does the First Amendment permit the use of a state's RICO statute, in conjunction with a state's obscenity laws, to prosecute sellers of obscene materials?

II. Does a prosecutor, through a controlled buy of specific sexually explicit materials and by obtaining an independent judicial determination of probable cause, improperly act to establish contemporary community standards relating to obscenity for purposes of prosecution?

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STATEMENT OF THE CASE

Respondent Jerry Hill, as State Attorney for Florida's Tenth Judicial Circuit, is charged with upholding the laws of the State of Florida. Florida law prohibits the sale of obscene materials. § 847.011, Fla. Stat. Florida's RICO Act (Sections 895.01-895.06, Florida Statutes) provides that violations of § 847.011 are predicate acts, as set forth in § 895.02(1)(a)36, Fla. Stat. In accordance with this Court's ruling in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), Respondent routinely charges sellers of obscene materials with violations of § 847.011, Fla. Stat., and the Florida RICO Act.

Prior to bringing charges against a seller of sexually explicit materials, the materials are first purchased by law enforcement officers through a controlled buy procedure. After securing the sexually explicit materials, the Respondent presents those materials to a circuit judge for the purpose of obtaining a determination of probable cause in compliance with *Roaden v. Kentucky*, 413 U.S. 496 (1973). Once there has been an independent judicial determination of probable cause, Respondent then files the appropriate charges under Florida law. Pet. App. A. 10.

Individuals charged under this procedure have made the decision to resolve their respective cases prior to going to trial by entering into plea agreements. As part of those plea agreements, they have agreed to cease selling obscene materials in compliance with Florida law. Those owning real property upon which businesses were conducted in violation of § 847.011, Fla. Stat., have agreed to not use the property for the purposes of conducting the sale of obscene materials in the future. Pet. App. A.10-A.11.

The district court below, affirmed by the court of appeals, expressly found that Petitioner's argument--that he had self-

censored himself out of the business of selling videos because of the chilling effect created by enforcement of Florida's laws-- was simply not supported by the record. The court determined that only after a judge had made a threshold determination that the materials violated Florida's obscenity law did Respondent bring, or threaten to bring, formal charges under Florida's RICO Act. Pet. App. A.10. No evidence was presented below that an individual who sold only protected content materials was ever prosecuted or threatened with prosecution under Florida's RICO Act. Pet. App. A.10. The district court determined that those charged with serious crimes agreed to settle their cases as they, and their legal counsel, deemed appropriate. As noted by the district court, "[t]he concessions agreed to by those individuals, to the extent that they included restrictions on the sale of protected speech, are incidental to the plea bargaining process which was triggered not by threats of prosecution for distribution of protected speech but by criminal prosecution under Florida's obscenity and RICO laws." Pet. App. A.11. The district court and the court of appeals found that the Respondent properly pursued criminal prosecution under Florida's obscenity and RICO laws.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Petitioner's arguments do not support a finding that the courts below misapplied this Court's ruling in *Miller v. California*, 413 U.S. 15 (1973). Rather, the petition is nothing more than an invitation for this Court to overturn the long-established rulings of *Miller* and *Fort Wayne Books*. Pet. at 12-13, fn. 6. Based upon his own concession below, Pet. App. A. 12, Petitioner is estopped from arguing that Florida's obscenity law does not comply with foundational law set forth in *Miller*. The court of appeals, and the district court before it, properly applied *Miller* and found that Florida's obscenity statute was not impermissibly vague, either on its face or as applied.

In order for this Court to grant certiorari, Petitioner must show that the court of appeals entered a decision that is in conflict with a decision of another court of appeals on the same important matter or decided an important federal question in a way that conflicts with relevant decisions of this Court. S. Ct. Rule 10(a) and 10(c). The petition fails to meet any of these criteria.

I. THE USE OF FLORIDA'S RICO ACT IN CONJUNCTION WITH FLORIDA'S OBSCENITY LAW IS IN STRICT COMPLIANCE WITH THE HOLDING OF THIS COURT IN *FORT WAYNE BOOKS, INC. v. INDIANA*, 489 U.S. 46 (1989), AND THE RECORD DOES NOT SUPPORT THE ASSERTION THAT PROTECTED SPEECH HAS BEEN CHILLED.

As this Court reasoned in *Fort Wayne Books*, there is no constitutional difference between the potential punishments for violation of obscenity laws and violation of RICO Acts. 489 U.S. at 59. The sum total of Petitioner's argument is that because Florida's RICO Act provides the potential for a greater number of years punishment than did the Indiana RICO Act, (thirty years vs. five years) this Court must now revisit its ruling in *Fort Wayne Books* and recede therefrom. However, Petitioner fails to grasp the reasoning of the Court in finding that there was no constitutional difference based on potential punishments.

Constitutional safeguards are observed when states adhere to the rulings of this Court in establishing their respective obscenity laws. Florida's obscenity laws adhere to the strict dictates of this Court as set forth in *Miller*. In fact, Petitioner conceded that point below. Pet. App. A.4. In sum, Petitioner has failed to demonstrate that the lower courts decided an important federal question in a way that conflicts with relevant decisions of

this Court and that would warrant a grant of certiorari.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE LOWER COURTS WERE NOT PRESENTED WITH THE QUESTION OF ESTABLISHMENT OF CONTEMPORARY COMMUNITY STANDARDS, AND THEREFORE THE ISSUE HAS NOT BEEN PRESERVED FOR REVIEW.

Petitioner attempts to raise before this Court an issue not directly raised before the lower courts: whether *Miller* provides a constitutional method to establish contemporary community standards. However, the single question of law presented by the Petitioner to the Eleventh Circuit Court of Appeals was:

> The Florida RICO Act Creates a Chilling Effect and Constitutes an Unlawful Prior Restraint on Protected Speech When Misdemeanor Violations of the Florida Obscenity Laws Are Used as Predicate Offenses.

Petitioner's Brief to the Eleventh Circuit. This point does not contend that one person–the Respondent Hill--determined the "community standards" for his circuit.

Petitioner argued below that he believed that the penalties of the Florida RICO Act created a chilling effect. He contended that the threatened severity of the penalty amounted to an unconstitutional prior restraint on protected expression when misdemeanor obscenity law violations were used as predicate offenses for RICO charges.

The district court found Petitioner's claim--that various words and phrases within the definitional language of the Florida obscenity statute are so vague that a video store proprietor could

not determine contemporary community standards without conducting an empirical study-- was without merit. The real attack then was upon *Miller* and its implied lack of proper definitional language, not upon the application of *Miller* by the lower courts.

Petitioner's action in the district court was a constitutional challenge to the use of Florida's RICO Act in conjunction with Florida's allegedly vague obscenity law. Petitioner claimed Florida's obscenity law was constitutionally vague on its face, thereby rendering Florida's use of its RICO Act unconstitutional when obscenity violations were used as predicate acts. R. App. A at A.1-A.7. The district court quickly disposed of that argument when Petitioner acknowledged the challenged statute's absolute conformity with the standards of *Miller*. Pet. App. A. 4. The court further considered the possibility that Petitioner meant to raise a constitutional challenge to the application of § 847.011, Fla. Stat. This was just as quickly disposed of by the court, which found that Respondent had complied with *Fort Wayne Books* and carried his burden of justifying use of Florida's RICO Act in conjunction with Florida's obscenity law. Pet. App. A. 12-13, fn. 6.

First Amendment protection does not extend to obscene materials. *Roth v. United States*, 354 U.S. 476 (1957). Florida's obscenity law, § 847.001(10), Fla. Stat., tracks directly the language required by *Miller*. As Petitioner acknowledged below, there has been no misapplication of *Miller*. Pet. App. A. 4. Now, however, Petitioner asks this Court to revisit and overturn *Miller* and *Fort Wayne Books*. Although Petitioner cites *Miller*, he is actually asking this Court to review the use of Florida's RICO Act in conjunction with Florida's obscenity law, a review more properly conducted under *Fort Wayne Books*. The intimidation factor complained of by Petitioner is not the result of Florida's obscenity law or the enforcement of that law; it is the use of violations of that law as predicates for Florida's RICO

Act that is at the heart of Petitioner's argument. Pet. at 3. Consequently, Petitioner's argument over jury review is not properly at issue.

As determined by the court of appeals, and the district court before it, Respondent properly used the existing Florida obscenity law to charge individuals selling or distributing obscene materials. The Petitioner, as noted by the district court's opinion, acknowledged that Florida's obscenity law undeniably comported with the long-established *Miller* test. Simply put, no application of *Miller* was required. The Petitioner did not challenge the obscenity law itself, necessarily including the establishment of a contemporary community standard. Instead, he challenged Respondent's application of the law by enforcement in conjunction with Florida's RICO Act. Petitioner's argument now falls squarely within the holding of *Fort Wayne Books*. Therefore, Petitioner's argument that the lower court misapplied *Miller* is erroneous and his petition should be denied.

III. PETITIONER DID NOT CHALLENGE THE DETERMINATION OF PROBABLE CAUSE IN THE LOWER COURTS.

As set forth in Section II above, Petitioner has failed to properly preserve the probable cause issue for review. In the interest of brevity, Respondent adopts those arguments set forth above in Section II. Respondent further argues that the petition should be denied because there is no need for a jury to establish a contemporary community standard before obscenity laws may be enforced.

When this Court decided *Roth*, a concern was raised that it would be difficult to establish a contemporary community standard "because juries may reach different conclusions as to

the same material," thereby rendering the statutes "insufficiently precise" to satisfy the requirements of due process. 354 U.S. at 491. This Court acknowledged that ". . .it is common experience that different juries may reach different results under any criminal statute." *Id.* at 492, n. 30. However, the Court went on to hold that: ". . .these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." *Id.* at 492. That is the case at bar. Petitioner is given adequate notice of what sexually explicit materials are prohibited under Florida's obscenity law without a predetermination by a jury that any particular sexually explicit material is obscene under a pre-established contemporary community standard.

The contemporary community standard, as envisioned by the holdings of this Court, is based upon the reasonable person objective standard. Again, in *Roth*, expressing concern about the proper standards for judging obscenity, this Court found that the boundaries must be sufficiently distinct for judges and juries to fairly administer the law. 354 U.S. at 491-492 (quoting *United States v. Petrillo*, 332 U.S. 1 (1947)). Those boundaries were more firmly set in *Miller*. When called upon by Respondent to render a determination of probable cause for suspected obscene materials, the trial judges in the state's circuit court adhered to those boundaries through application of the standards set forth in Florida's obscenity law. Only after a determination of probable cause under the *Miller* standards was a criminal information or indictment filed. Moreover, even when sexually explicit materials are presented to juries, it is possible that different verdicts could be reached based upon the composition of the jury itself. How then would Plaintiff have any better idea how to comply with Florida's obscenity law than he was afforded by the *Miller* language contained within the law itself?

Importantly, the *Miller* language contained within Florida's obscenity law must also guide law enforcement when determining if any particular sexually explicit material has crossed the line between acceptable adult-oriented sexual materials and unacceptable obscenity. If, as Petitioner suggests, it is first necessary to establish a firm contemporary community standard by determination of a jury, state law enforcement would be prohibited from using the law itself. The first case would therefore never reach a jury. Each time an individual was charged with a violation of the law, he could claim he did not know the sexually explicit materials he sold or distributed were obscene because no jury had found them to be unacceptable under contemporary community standards.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Civil Action, Case Number _____

GREGORY BURRIS, d/b/a Video Plus,	)
	)
Plaintiff,	)
	)
	)
v.	)**PLAINTIFF'S COMPLAINT**
	)**FOR DECLARATORY**
JERRY HILL, State Attorney for the Tenth Judicial Circuit of Florida,	)**JUDGMENT AND**
	)**PERMANENT INJUNCTION**
	)
	)
	)
Defendant.	)
	)
_____	)

Plaintiff, **GREGORY BURRIS,** sues Defendant, **JERRY HILL,** for a judgment declaring that Florida's Racketeer Influenced and Corrupt Organizations Act (RICO) (F.S. Chpt. 895) when used in conjunction with Florida's obscenity statute (F.S. Chpt. 847) creates a chilling effect and an unconstitutional prior restraint on protected speech, and Plaintiff seeks an injunction permanently enjoining Defendant from enforcing the Florida RICO Act against him when obscenity is alleged as the predicate offense.

PARTIES

1. Plaintiff GREGORY BURRIS (hereinafter "BURRIS") is a citizen of the United States who owns and operates a retail video tape sales and rental business at 1938 East Main Street in Lakeland, Polk County, Florida.

2. Defendant JERRY HILL (hereinafter "HILL") is the duly elected state attorney for the tenth judicial circuit of Florida and is charged with prosecuting violations of Florida law in said circuit, which includes Lakeland, Polk County, Florida.

JURISDICTION

3. This action is brought pursuant to Title 42 U.S.C. §§ 1983 and 1988 and the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon Title 28 U.S.C. § 1341(3) and (4) and the aforesaid statutory and constitutional provisions. This Court has the authority to issue declaratory judgments and permanent injunctions pursuant to Title 28 U.S.C. §§ 2201 and 2202.

VENUE

4. All of the acts alleged in this Complaint have occurred and continue to occur in Lakeland, Polk County, Florida, within the Middle District of Florida, Tampa Division.

FACTS AND CHALLENGES

5. On or about November 1, 1998, BURRIS began operating a retail video tape sales and rental business in Lakeland, Polk County, Florida.

6. As a part of his business operation, BURRIS wishes to sell and rent a small number of sexually oriented, non-obscene

video tapes, but not a large enough number to bring BURRIS's business operation within the definition of the term "adult bookstore" as it is defined in the Lakeland Comprehensive Adult Use Regulation Ordinance.

7. Although BURRIS wishes to sell and rent a small number of sexually oriented, non-obscene video tapes, he has refrained from doing so because he is afraid that HILL will file criminal charges against him for violating the Florida RICO Act (F.S. Chpt. 895) as it applies to obscenity (F.S. Chpt. 847).

8. A violation of Florida's RICO Act constitutes a first degree felony which carries a maximum sentence of thirty (30) years imprisonment and a maximum fine of ten thousand dollars ($10,000.00).

9. Although the Florida Supreme Court has ruled that the Florida obscenity law is not unconstitutionally vague, it is nonetheless inherently vague and difficult to comprehend, and it does not contain a meaningful scienter requirement.

10. During the past few years, HILL and/or his predecessor have filed charges against numerous owners and employees of adult-oriented businesses for violating the Florida RICO Act wherein obscenity was used as the predicate offense upon which the RICO charge was based.

11. Typically, HILL has charged said individuals with violating the Florida RICO Act as it applies to obscenity .and also with conspiring to violate said Act so that the maximum sentence is sixty (60) years imprisonment and the maximum fine is Twenty Thousand Dollars ($20,000.00).

12. A search warrant is ordinarily executed on the adult business premises and the owner's computer equipment, cash register and business records are seized, thereby effectively

closing the business.

13. Because a RICO violation constitutes a first degree felony, the bail with which the owners and employees of adult businesses are initially confronted is always high, and sometimes as high as $200,000.00 when HILL charges them with RICO violations based on obscenity.

14. Although the terms vary, HILL offers said owners and employees a plea bargain which typically consists of HILL'S agreeing to dismiss or greatly reduce the RICO charges if the owners and employees agree to the following:

(a) Permanently close the adult-oriented business and remove all signs relating to its existence;

(b) record a deed restriction in the county's property records restricting the business property from ever again being used for an adult oriented use (if the business owner is also the property owner);

(c) never again be associated with any sexually oriented business within the Tenth Judicial Circuit of Florida; and

(d) pay a fine and/or court costs and/or the costs of the investigation that led to the RICO charges.

15. In all cases of which BURRIS is aware, the owners of adult-oriented business who were charged with violating the Florida RICO Act wherein obscenity was used as the predicate offense have all agreed to close their businesses rather than face the Act's severe penalties.

16. When obscenity is used as the predicate offense, the use of the Florida RICO Act to prosecute owners of adult-oriented businesses has a chilling effect and constitutes an

unlawful prior restraint on presumptively protected expression because when faced with the severity of the Florida RICO Act and the inherent vagueness of the Florida obscenity law, coupled with HILL's offer of dismissal or charge reduction as described above, few, if any, individuals will contest the charges.

17. The severity of the Florida RICO Act's penalties coupled with the inherent vagueness of the Florida obscenity law and the traditional willingness of HILL to use the RICO Act against adult-oriented businesses has caused BURRIS to be afraid to sell or rent sexually oriented video tapes.

18. The severity of the Florida RICO Act's penalties coupled with the inherent vagueness of the Florida obscenity law and the aforesaid actions of HILL have deprived and continue to deprive BURRIS and his patrons and the public at large of rights guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution.

19. All of the actions of HILL have been and continue to be under color of state law or authority.

COUNT ONE - DECLARATORY JUDGMENT

20. BURRIS realleges each and every allegation set forth in paragraphs 1-19 of this complaint and incorporates them therein by reference.

21. BURRIS is uncertain as to his rights under the First and Fourteenth Amendments to the United States Constitution as those rights will be affected by HILL's enforcement against BURRIS of the Florida RICO Act in conjunction with the Florida obscenity law.

22. There is a substantial and actual justiciable controvery over BURRIS's right under the First and Fourteenth

Amendments to the United States Constitution as those rights will be affected by HILL's enforcement against BURRIS of the Florida RICO Act in conjunction with the Florida obscenity law.

23. BURRIS is entitled to a judgment declaring the constitutionality of the Florida RICO Act when used in conjunction with the Florida obscenity law.

WHEREFORE, BURRIS requests that this Court grant him the following relief:

A. Issue a judgment declaring that the enforcement of the Florida RICO Act when obscenity is used as the predicate offense has a chilling effect and constitutes an unlawful prior restraint on protected expression in violation of the First and Fourteenth Amendments to the United States Constitution.

B. Award to BURRIS all reasonable costs of this action, including attorneys' fees pursuant to Title 42 U.S.C. § 1988.

C. Any other relief in law or in equity to which BURRIS may be entitled.

COUNT TWO - PERMANENT INJUNCTION

24. BURRIS realleges each and every allegation set forth in paragraphs 1-19 of this complaint and incorporates them herein by reference.

25. BURRIS has a clear legal right to sell and rent sexually oriented, non-obscene video tapes to his customers and this right is protected by the First and Fourteenth Amendments to the United States Constitution.

26. BURRIS and his agents, employees and the public at large will suffer irreparable injury if this Court does not issue an

injunction enjoining HILL from enforcing against BURRIS The Florida RICO Act when Florida obscenity law is used as the predicate offense.

27. BURRIS has no adequate remedy at law because he is being deprived of his First Amendment rights, and in such cases, damages are both inadequate and unascertainable.

28. The entry of a permanent injunction against HILL will serve the public interest by prohibiting the application of an unconstitutional law which interferes with the public's rights under the First Amendment.

WHEREFORE, BURRIS requests that this Court grant him the following relief:

A. Issue a permanent injunction against HILL forever prohibiting him from enforcing against BURRIS the Florida RICO Act when obscenity is used as the predicate offense.

B. Award to BURRIS all reasonable costs of this action, including attorneys' fees pursuant to 42 U.S.C. § 1988.

C. Any other relief in law or in equity to which BURRIS may be entitled.

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